
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Chapter 13 Case
SHIRLEY LOUISE WATKINS)	
)	Number <u>95-20389</u>
<i>Debtor</i>)	
)	
)	
GEORGE H. STEWART, SR.,)	
THOMAS D. STEWART, JR.)	
)	
<i>Movants</i>)	
)	
)	
v.)	
)	
SYLVIA FORD BROWN,)	
Chapter 13 Trustee))	
)	
<i>Respondent</i>)	

MEMORANDUM AND ORDER ON MOTION FOR RELIEF

Creditors, George and Thomas Stewart (hereinafter "Movants"), come before this Court requesting relief in the above-captioned matter. In their Motion for Relief, Movants contend that although their security deed was not perfected, their claim is entitled

to secured status because the trustee had "constructive" or "inquiry" notice of Movant's security deed. Based upon the parties' briefs, the record in the file, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The following facts are not in dispute. Creditors George and Thomas Stewart are the holders of a promissory note given by Debtor on November 18, 1994, in the principal amount of \$60,200.00, with interest thereon at the rate of ten percent per annum, due and payable on November 18, 1995. As security for the note, Debtor conveyed to Movants by deed to secure a debt dated November 18, 1994, two tracts of land, one in Glynn County and the other in Hall County.¹

Movants recorded the security deed in the Office of the Clerk of Superior Court of Glynn County, Georgia, but apparently due to an administrative error of their agent failed to record the deed in Hall County. Movants were not aware that the security deed had not been recorded until after the filing of Debtor's bankruptcy petition. Because Movants are prevented, under U.S.C. Section 362, from perfecting their lien against the Hall County property, Movants request relief from the automatic stay to perfect their interest.

¹ The two tracts of land are the following:
a. Lot 5 of Ocean Village Subdivision, St. Simons Island, Glynn County, Georgia.
b. 10.03 acres in the Morgan District of Hall County.

Debtor, Shirley Louise Watkins, filed for protection under Chapter 13 of the Bankruptcy Code on May 24, 1995. In the original petition, Schedule D listed four secured creditors: First Georgia Bank, First National Bank of Georgia, GMAC, and Sears. On June 19, 1995, Debtor filed an amendment to Schedule D and included Movants as a secured creditor. The creditors meeting was held on June 20, 1995. Movants filed a secured claim, claim number 14, in the amount of \$63,090.32. The Chapter 13 Trustee objected to the granting of secured status to the claim based on an unperfected lien.

Movants contend that the scheduling of their claim as secured put the trustee on "inquiry notice" to determine the existence of a potential lien against the Hall County property. Trustee responds that the Bankruptcy Code provides that the Trustee shall assume the status of a bona fide purchaser of real property and under Georgia law a bona fide purchaser prevails over a previous, unrecorded grantee. The matter was taken under advisement and both parties have submitted letter briefs.

CONCLUSIONS OF LAW

The sole issue to be decided is whether a trustee is put on "inquiry notice" when a debtor amends her schedule of secured creditors to include an unperfected creditor prior to the 341 meeting of creditors.

11 U.S.C. Section 544(a)(3) provides in relevant part the following:

The trustee shall have, as of the commencement of the case, *and without regard to any knowledge of the trustee* or of any creditor, the rights and powers of . . . a bona fide purchaser of real property . . . whether or not such purchaser exists [and has perfected such transfer]. (emphasis added)

Furthermore, Georgia law provides:

Every unrecorded voluntary deed or conveyance of land made by any person *shall be void as against subsequent bona fide purchasers* for value without notice of such voluntary deed or conveyance; provided, however, that, if the voluntary deed or conveyance is recorded in accordance with Code 44-2-1, it shall have priority over subsequent deeds or conveyances to the described land.²

Ga. Code Ann. Section 44-2-3 (1991).

Movants acknowledge that their interest would be unsecured under a straightforward reading of the applicable statutes. However, Movants contend that in certain instances, a trustee is placed upon "constructive" or "inquiry" notice. *See In re Professional Inv. Properties of America*, 955 F.2d 623 (9th Cir. 1992) (involuntary petition put bankruptcy trustee on sufficient inquiry notice so that trustee could not invoke avoidance powers); *In re Marino*, 813 F.2d 1562, 1565 (9th Cir. 1987) (constructive notice or inquiry

² Georgia law 44-2-1 provides:

Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the land is located. A deed may be recorded at any time, but a prior unrecorded deed loses its priority over a subsequent recorded deed from the same vendor when the purchaser takes such deed without notice of the existence of the prior deed.

notice may limit the trustee's section 544(a)(3) avoidance power); McCannon v. Marston, 679 F.2d 13 (3rd Cir. 1982) (purchaser's possession of unit obliged trustee to inquire into possessor's claimed interest). Movants assert that because the debt was scheduled as secured that the trustee had a duty to inquire into the existence of a claim. Trustee responds that Georgia law permits the avoidance of the creditor's lien. Furthermore, even if a trustee has an inquiry duty at the commencement of the case, because Debtor's original schedule failed to include Movant's claim upon filing, Trustee may still avoid the lien.

Although under state law a court must determine the existence of "actual notice" of an individual claiming the status of a bona fide purchaser, 11 U.S.C. 544(a) clearly establishes a different federal rule in granting certain "strong-arm" powers to the trustee. The Code empowers the trustee to avoid the unrecorded liens "without regard" to any knowledge the trustee may possess. Moreover, 11 U.S.C. Section 544(a) clearly grants the trustee its powers "as of the commencement of the case." This Chapter 13 commenced upon its filing on May 23, 1995. At that time, Debtor had not listed Movants as secured creditors and Trustee could not have possessed any duty to inquire into the existence of possible liens. Thus, under Section 544(a), Trustee, as a bona fide purchaser may avoid the lien of Movants. Therefore, Trustee's objection must be sustained and the Movant's motion for relief will be denied.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS
THE ORDER OF THIS COURT that the Motion for Relief filed by creditors George H.
Stewart, Sr., and Thomas D. Stewart, Jr. is DENIED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of October, 1995.